

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals)	
with Hearing and Speech Disabilities)	

To: The Commission

REPLY COMMENTS

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TABLE OF CONTENTS

	Page
I. The ADA Requires that TRS be Functionally Equivalent to Voice Telephone Service.....	3
II. The Commission Should Freeze Rates For TRS and Related Services Until the Commission Issues an Order Resolving the Issues Raised in the FNPRM	4
III. Any Rate Methodology Adopted by the Commission Should Ensure a Rate Sufficient to Cover All Reasonable Expenses	6
A. Vendors Must Be Adequately Compensated For the Reasonable Operational and Executive Costs of Their TRS Services	7
B. The TRS Fund Must Support General and Brand Name Outreach and Marketing.....	8
C. The TRS Fund Must Support Research and Development.....	10
D. There Should be More Transparency in the Rate Setting Process.....	11
IV. Conclusion	12

SUMMARY

The Consumer Groups submit these Reply Comments to NECA's recommended payment formula and fund size for the Interstate Telecommunications Relay Services ("TRS") Fund for July 2007 through July 2008.

The Consumer Groups support Verizon's proposal for the Commission to freeze TRS rates at their current levels until the rate setting issues discussed in the Further Notice of Proposed Rulemaking ("FNPRM") released on July 20, 2006 have been resolved. Issuing new TRS rates using the existing methodology would only perpetuate the problems that prompted the Commission to issue the FNPRM in the first place. There is near universal agreement amongst TRS consumers and providers, and the Commission itself has acknowledged, that the current method of computing the TRS rate is flawed.

The Consumer Groups also reaffirm their position that the Commission should expand the TRS Fund Advisory Council's ("Advisory Council") role in the rate setting process by allowing it to study the issue and make a recommendation before the Commission takes action on the matter. Because the Advisory Council consists of a cross section of government, business, and community members, the Advisory Council can offer the Commission a balanced perspective on the contentious issues at hand.

Alternatively, should the Commission decide to move forward with the process of setting new rates for the 2006-2007 year, the Consumer Groups do not endorse a particular rate methodology. Rather, the Consumer Groups ask that the Commission adopt a rate that meets the following principles: 1) adequately compensates (but does not over or under-compensate) providers for their TRS services, including the cost of qualified deaf interpreters and the cost of implementing and providing 911 service; 2) supports general and brand name outreach and

marketing; and 3) covers reasonable research and development costs. Finally, any rate methodology adopted must provide greater transparency to the rate-making process.

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**REPLY COMMENTS OF
TELECOMMUNICATIONS FOR THE DEAF AND HARD OF HEARING, INC.;
ASSOCIATION OF LATE-DEAFENED ADULTS, INC.;
NATIONAL ASSOCIATION OF THE DEAF;
DEAF AND HARD OF HEARING CONSUMER ADVOCACY NETWORK;
CALIFORNIA COALITION OF AGENCIES SERVING
THE DEAF AND HARD OF HEARING; AND
HEARING LOSS ASSOCIATION OF AMERICA**

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), through undersigned counsel, Association of Late-Deafened Adults, Inc. (“ALDA”), National Association of the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”) and Hearing Loss Association of America (“HLAA”) (collectively, the “Consumer Groups”), in response to Public Notice, DA 07-1978, released May 2, 2007, hereby submit their reply comments on the payment formula and fund size for the Interstate Telecommunications Relay Services (“TRS”) Fund for July 2007 through July 2008.

The Consumer Groups support Verizon's¹ proposal for the Commission to freeze the rates for TRS at their existing levels until the rate setting issues discussed in the Further Notice of Proposed Rulemaking released on July 20, 2006² have been resolved. In that FNPRM, the FCC sought comment on a broad range of issues related to compensation of providers from the TRS Fund.³ Two of the Commission's key objectives in that FNPRM were to solicit comment on the merits of the current method of setting rates for TRS, IP Relay, Speech-to-Speech and Video Relay Service ("VRS"), and to consider alternative ratemaking methodologies. The Commission now has an extensive record on which it can rely when reforming the rate-making process. For this reason, the Consumer Groups believe it would be premature for the Commission to issue new rates for TRS and related services when it has yet to resolve the concerns addressed in the FNPRM. Furthermore, the Commission should place greater emphasis on role of the TRS Funds Advisory Council ("Advisory Council") by not enacting *any* new rate methodology until the Council has had a chance to look at the confidential and/or proprietary information submitted by the providers, pursuant to a nondisclosure agreement or

¹ Verizon's Comments on Payment Formula and Fund Size Estimate for Interstate TRS Fund For July 2005 Through July 2006, CG Docket No. 03-123, filed May 17, 2007 ("Verizon Comments").

² *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, CC Doc. No. 03-123, FCC 06-106, (July 20, 2006) ("FNPRM").

³ The Commission sought comment on the following issues: alternative cost recovery methodologies for interstate traditional TRS and Speech-to-Speech ("STS"), including Hamilton Relay, Inc.'s ("Hamilton") proposed "MARS" plan ("Multi-state Average Rate Structure"), and also whether traditional TRS and STS should be compensated at the same rate; the appropriate cost recovery methodology for Video Relay Service ("VRS") and the length of time the VRS rate should be in effect; the "reasonable" costs compensable under the present cost recovery methodology, including whether, and to what extent, marketing and outreach expenses, overhead costs, and executive compensation are compensable from the Fund; and ways to improve the management and administration of the Fund, including adopting measures for assessing the performance and efficiency of the Fund and to deter waste, fraud, and abuse.

protective order, if necessary, to study the issue and to make a recommendation to the Commission.

Alternatively, if the Commission decides to move forward with the process of setting new rates for the 2006-2007 year, the Consumer Groups do not endorse a particular rate methodology. Rather, the Consumer Groups support the principles that the Commission should set a rate that 1) adequately compensates (but does not over or under-compensate) providers for their TRS services; 2) supports general and brand name outreach and marketing; 3) covers reasonable research and development costs; and 4) increases the transparency of the rate-making process.

I. The ADA Requires that TRS be Functionally Equivalent to Voice Telephone Service

As a preliminary matter, the Consumer Groups note that parties in TRS proceedings have at times referred to TRS as an *accommodation* under the ADA for persons with disabilities. This use of the word “accommodation” is inappropriate because Section 225 of the Communications Act of 1934, as amended (the “Act”), requires the Commission to ensure the availability of TRS.⁴ The Act defines TRS as telephone transmission services that provide the ability for people who are deaf or hard of hearing to communicate with hearing people “in a manner that is *functionally equivalent*” to the ability of hearing people to communicate with each other.⁵ In other words, the Americans with Disabilities Act (“ADA”)⁶ requires a lot more than that TRS be an “accommodation.” It specifically requires that TRS be “functionally equivalent” to the telephone services used by hearing people. In other words, TRS is a form of universal service.

⁴ 47 U.S.C. § 225(b)(1).

⁵ 47 U.S.C. § 225(a)(3) (emphasis added).

⁶ PL 101-336, July 26, 1990, codified at 47 U.S.C. § 225.

Just as the Universal Service Fund ensures service at reasonable rates to consumers located in high cost areas, it is the FCC's statutory duty to ensure that the TRS industry has the funding necessary to provide functionally equivalent services to the deaf and hard-of-hearing communities.

II. The Commission Should Freeze Rates for TRS and Related Services Until the Commission Issues an Order Resolving the Issues Raised in the FNPRM

In its comments filed on May 16, Verizon argues that the Commission should freeze its TRS rates at the level set in the 2006 Rate Order⁷ until the Commission issues an order in the FNPRM proceeding.⁸ The Consumer Groups agree with Verizon. Issuing new rates under the “old” system will only perpetuate the problems that prompted the Commission it to issue the FNPRM in the first place.

Almost every Commenter to the FNPRM agreed that the existing rate setting methodology is inherently flawed. For example, Sprint Nextel expressed concern that the current rate setting process is “broken and in serious need of repair.”⁹ In general, TRS providers argued that the current method of rate setting is inefficient, suffers from a lack of transparency, and often produces inaccurate results.¹⁰ Indeed, the FCC itself stated that its reason for issuing the FNPRM stemmed as much from “dissatisfaction with the rate setting *process*” as it did from

⁷ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG Docket No. 03-123 (June 29, 2006) (“2006 Rate Order”).

⁸ Verizon Comments, at 2.

⁹ Comments of Sprint Nextel, CG Docket No. 03-123, October 30, 2006, at 1 (“Sprint Comments”).

¹⁰ *See, e.g., Id.* at 7; Comments of Verizon, CG Docket No. 03-123, filed on October 30, 2006; Comments of Hamilton Relay, Inc., CG Docket No. 03-123, filed on October 30, 2006.

dissatisfaction with the rates.¹¹ Given the significant level of distrust that all parties seem to have in the current rate setting methodology, it makes no sense for the Commission to go through the exercise of setting new rates under the current, “broken” system. This is especially true given the extensive record developed in this proceeding. The Commission has more than enough information necessary to render a decision, and should therefore concentrate its efforts on resolving this matter rather than waste time re-calculating new rates under what is ultimately a defunct methodology.

Furthermore, by freezing rates at existing levels, the Commission will have the added benefit of providing stability that is sorely lacking in the industry. Since NECA has already collected much of the information necessary to set the rate under *any* of the suggested formulas, there will be little delay in implementing the new rate or rate formula once the Commission renders a decision on the issue.

Finally, the Consumer Groups reaffirm their position that the Commission must expand the role of the Advisory Council in the rate setting process by providing it an opportunity to study the issues and offer an official recommendation before the Commission takes action on this matter. The Advisory Council is well suited to provide the Commission with a balanced perspective on the merits of any new rate setting methodology because it consists of a cross-section of government, industry, and consumer group members. Because these members often have competing interests, the Advisory Council’s ultimate recommendation will, at the very least, provide the Commission valuable insight into solutions that the parties involved consider a fair compromise. However, the Consumer Groups emphasize that the Advisory Council must have access to all pertinent data, including confidential and/or proprietary cost data, pursuant to a

¹¹ FNPRM, at ¶ 7 (emphasis in original).

non-disclosure agreement or a protective order, if necessary, so that the Advisory Council can make an informed recommendation. The Consumer Groups firmly believe that expanding the Advisory Council's role in this manner will lead to a more equitable result for all parties.

III. Any Rate Methodology Adopted by the Commission Should Ensure a Rate Sufficient to Cover All Reasonable Expenses

Although the Consumer Groups do not endorse a particular rate methodology, any methodology adopted by the Commission must result in a rate that covers all reasonable expenses that are critical to making these services available the public. Moreover, any methodology must provide transparency to the process. The rate methodology must fairly reimburse providers for the following: basic operational and properly allocated executive compensation, reasonable outreach and marketing expenses, and research and development. Insufficient funding to cover these areas would do a disservice to members of the deaf and hard of hearing communities and the hearing public by reducing the visibility, reliability, and availability of the existing and future TRS services. Insufficient funding would also adversely impact members of these groups, many of whom rely on TRS services to communicate with family members, friends, neighbors and business associates, as well as consumers, service providers, and businesses.

Nevertheless, like the Commission, the Consumer Groups are concerned about preserving the integrity of the Interstate TRS Fund and do not advocate handing the TRS providers a "blank check" to cover unlimited expenses. Instead, the Consumer Groups encourage the Commission to limit the rate to reimbursement of expenses that are reasonable. As part of the rate determination process, the Interstate TRS Fund Advisory Council, the Interstate TRS Fund Administrator and the FCC should review the proposed allocation of operational and executive

costs, marketing and outreach, and research and development expenses to ensure that they are reasonable.

A. Providers Must Be Adequately Compensated for the Reasonable Operational and Executive Costs of Their TRS Services

The Consumer Groups believe it is important to compensate TRS providers with rates sufficient to fund all reasonable operational costs, which would include all reasonable costs directly and indirectly linked to the provision of TRS services. For example, in addition to direct costs such as salaries, office rent, and equipment, TRS rates must compensate providers for the reasonable cost of recruitment, training, and retention of communications assistants, including interpreters, and other TRS personnel, because recruitment, training, and retention is essential to the provision of quality services. It is also particularly important for the FCC to ensure that TRS providers receive sufficient compensation to enable them to build the facilities and hire the staff necessary to meet the Commission's speed of answer requirements.¹² Other indirect costs such as those associated with employee health benefits and 401(k) plans, and other employee benefits commonly provided by employers, should also be included in the compensation formula, provided that they are at reasonable levels.

The Consumer Groups believe that other costs not directly related to the provision of TRS service, but which can be shown to benefit the service, such as reasonable levels of executive compensation should also be reimbursed. For general overhead costs, including executive compensation, where such costs may be only partially related to provision of TRS

¹² In the FNPRM, the Commission mentioned that the new speed of answer requirements for VRS may have an impact on the cost of service. FNPRM at ¶¶ 27, 31. At this time, VRS and IP Relay providers must supply data to the Commission on compliance with the speed of answer rule. *Id.* At ¶ 48.

service, providers should be entitled to reimbursement for a reasonable allocation of that cost that corresponds to the provision of TRS services.

In addition, for VRS, the Consumer Groups recommend that the cost of qualified Deaf Interpreters when Deaf Interpreters are necessary, should be a compensable cost. Deaf Interpreters work with interpreters who are hearing to enable comprehension of certain people who are deaf when it is difficult to understand their signing. This may include people who were born in other countries and learned a form of sign language different from American Sign Language, use American Sign Language in an unconventional way, or have minimal or limited communication skills. Such people must not be left out of access to VRS, and when Deaf Interpreters are essential to providing VRS, then the functional equivalent requirement of the ADA mandates that Deaf Interpreters be used and that the use of the qualified Deaf Interpreters be compensated.

Further, the Consumer Groups recommend that TRS providers be reasonably compensated for costs associated with modifying or building platforms and systems to enable consumer access to the 911 system through TRS in the most effective manner possible before the current deadline of January 1, 2008 expires. Consumer groups do not support waivers that would extend the deadline further. Access to emergency services is critical for the protection of life, safety, and health of deaf and hard of hearing consumers, their families, friends, and associates.

B. The TRS Fund Must Support General and Brand Name Outreach and Marketing

It is well established that open, competitive markets result in higher levels of product innovation and dissemination of information to the public. By facilitating competition, reasonable levels of Interstate TRS Fund support for branded marketing provides the deaf and

hard of hearing communities and the hearing public with the benefits of a competitive TRS market. Marketing is a critical component of providing service because it allows TRS providers to more effectively reach their potential consumers. TRS providers can use branded marketing to distinguish themselves and the services they provide. The development and marketing of competitive “differentiators” brings significant benefits. It is the ability to market their respective brands which gives TRS provider the incentive to develop better quality and innovative services, because without branded marketing TRS providers would have no way of letting the consuming public know that they have something different, better or special to offer.

Branded marketing also increases the visibility of TRS providers to the deaf, hard of hearing, *and* hearing communities. Despite the growth of TRS, many people who are deaf or hard of hearing remain unaware of the services offered or how to access them. Further, the vast majority of hearing persons do not realize these services even exist. By covering the cost of branded marketing through the Interstate TRS Fund at reasonable levels, the Commission is making productive use of a quality inherent to the competitive market, because advertising increases the public’s awareness of TRS services. Like all consumers, people who are deaf or hard of hearing rely in substantial part on advertisements when making consumer-related decisions. Without branded marketing, the resulting deficit of information will make it more difficult for consumers to discern which services are best for them.

In sum, a reasonable level of compensation from the Interstate TRS Fund for branded marketing is essential if TRS and related services are to fulfill their potential. A larger, more reliable, and more visible network of TRS service providers will benefit the deaf and hard of hearing as well as the hearing communities. However, without reasonable levels of support from the Interstate TRS Fund for branded marketing, many TRS providers simply cannot afford to

advertise on their own, and will, therefore, have little incentive to go beyond the status quo in the provision of in their TRS service.

C. The TRS Fund Must Support Research and Development

It is the Commission's duty under the ADA to support research and development of new communications technologies. Specifically, the Act requires that the Commission ensure that interstate and intra-state relay services are available "in the most efficient manner possible."¹³ The Commission is also required to "ensure the regulations prescribed to implement this section encourage . . . the use of existing technology and do not discourage or impair the development of improved technology."¹⁴

The Commission, therefore, has a statutorily-defined role in promoting the development of new TRS technologies that assist people who are deaf or hard of hearing. Although the objective of the ADA is to provide the deaf and hard of hearing communities with "functional equivalency," the Commission must be mindful that functionally equivalency is a standard that will always change over time as technologies should and do develop. In other words, functional equivalency is not a standard that was set when the ADA was adopted in 1990. Rather, functional equivalency is an ever-evolving standard with a goal of providing TRS service in a manner as close in form and function to voice telephone service as is feasible at the time. At one point not so long ago, TTY service was the closest approximation to functional equivalency. Now, Internet-based technologies such as VRS have set a higher bar for the achievement of functional equivalency.

¹³ 47 U.S.C. § 225(b)(1).

¹⁴ 47 U.S.C. § 225(d)(2).

Indeed, the legislative history of the ADA demonstrates that Congress intended to encourage use of ““state-of-the-art”” technology and prevent ““freezing technology or thwarting the introduction of a superior or more efficient technology.””¹⁵ In recognition of these fundamental principles established by Congress, the Commission has held that “functional equivalence” requires “periodic reassessment” in light of the “ever-increasing availability of new services and the development of new technologies.”¹⁶ It is through funding of research and technology at reasonable levels from the Interstate TRS Fund that the Commission can support the development and improvement of new technologies that come closer to achieving higher levels of functional equivalency. Without funding for research and development at reasonable levels, the Commission would not be in compliance with its statutory obligation to “ensure the regulations prescribed to implement this section encourage . . . the use of existing technology and do not discourage or impair the development of improved technology.”¹⁷

D. There Should be More Transparency in the Rate Setting Process.

Finally, any new rate methodology adopted by the Commission must incorporate policies and procedures that make the process more transparent. NECA and the FCC are currently able to engage in significant “off the record” communications during the rate setting process. While the Consumer Groups recognize there are instances when the Commission must engage in confidential discussion with NECA, there is no reason to maintain NECA’s complete exemption

¹⁵ House Rept. 101-485 Pt. 2 at 131, 133-134).

¹⁶ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 5140, at ¶ 4 (2000).

¹⁷ 47 U.S.C. § 225(d)(2).

from the Commission's *ex parte* rules.¹⁸ The public interest is better served when the providers and consumers who are directly affected by these discussions are included in the process.

The Commission should implement new procedures that require NECA to disclose the content of its discussions (except that confidential and/or proprietary information submitted by the carriers may be redacted), or, at the very least, the fact that NECA is having discussions with the Commission on substantive TRS rate setting issues. This will help to resolve the feeling amongst many providers and consumer groups that NECA's proposed rates are not based entirely on the factual record. It will also allow interested parties an opportunity to address concerns over the rate setting issues at an earlier date, so that no party, including the Commission and NECA, are caught off guard when then final rate recommendation is issued.

IV. Conclusion

For the foregoing reasons, the Consumer Groups submit that that the Commission should freeze the rates for the Interstate TRS Fund at the levels enacted in the Commission's 2006 Rate Order until the Commission has issued an order resolving the issues raised in the FNPRM on TRS rate setting. However, if the Commission decides to issue a new rate, that rate should comply with the criteria outlined above.

¹⁸ 47 CFR § 1.1204(a)(12)(i).

Respectfully submitted,

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